



# Property, Contracts, and Politics

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# PROPERTY, CONTRACTS, AND POLITICS

Mark Tushnet\*

DEGREES OF FREEDOM: LOUISIANA AND CUBA AFTER SLAVERY. By *Rebecca J. Scott*. Cambridge and London: Harvard University Press. 2005. Pp. xi, 365. \$29.95.

## INTRODUCTION

Rebecca Scott<sup>1</sup> is a historian, not an economist. Describing how a dispute over a mule's ownership was resolved, Professor Scott reproduces a receipt two claimants left when they took the mule from the plantation whose manager claimed it as well (p. 185). By contrast, analyzing property relations in the pre-Civil War American South, economic historian Jenny Wahl observes, "[E]conomic historians tend to [use] . . . frequency tables, graphs, and charts."<sup>2</sup> The differences in visual aids to understanding indicate the various ways historians and economists approach a single topic—the relation between markets and politics, the latter defined to include the deployment of collective force. Professor Scott's theme is the mutual dependence of markets and politics in post-emancipation Louisiana and Cuba. Professor Scott examines post-emancipation Louisiana and Cuba, which are similar in some respects and different in others. Sugar production was important in both locations, for example, but the politics of freedom differed: In Louisiana freedom resulted from the North's defeat of the South in a civil war, whereas in Cuba it resulted from an independence struggle by Cubans, including slaves, against colonial domination.<sup>3</sup> Few economists would disagree with many of the propositions that they would extract from her narrative. Yet the tension between *narrative* and *proposition* is apparent.

This Review explores some aspects of that tension. Part I describes in largely economic terms some aspects of the post-emancipation property arrangements that Professor Scott describes historically. Relying on Professor Scott's descriptions in Part II, I sketch why her insistence on the mutual dependence of markets and politics is correct, with some speculation about why a division of labor among economists leads many economics-influenced legal scholars to underemphasize that dependence. It would be foolish to claim, and I do not, that *only* a historian could illuminate the

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1. Charles Gibson Distinguished University Professor of History and Professor of Law, University of Michigan.

2. JENNY BOURNE WAHL, *THE BONDSMAN'S BURDEN: AN ECONOMIC ANALYSIS OF THE COMMON LAW OF SLAVERY* 19 (1998).

3. The Cuban war for independence resulted in slavery's abolition; had the Southern war for independence succeeded, it would have resulted in slavery's further entrenchment.

mutual dependence of markets and politics. Rather, the historian's narratives and the economist's propositions shed light on that phenomenon from different angles.

One way of putting the differences is this: the historian offers narratives that the economist sees as instantiations of the kinds of general propositions economists capture in their equations.<sup>4</sup> Economists worry, though, that, lacking the discipline imposed by *some* well-specified theory, historians include in their narratives matters that more rigorous analysis would show to be irrelevant to the larger story the historian is telling—chance events such as the weather conditions on a particular day that lack the causal significance that the historian's narrative implicitly imputes to them simply by including them in the story.

While the economist offers general propositions, historians in turn worry that the economists' equations may provide accurate depictions of aggregate behavior, but exclude too much individual human experience that *might* be relevant to the larger story. Historians tend to be theory-skeptics, at least in the modest sense that they doubt that the theories we now have at hand are the ultimate theories that will account for the behavior they observe in history. They include material in their narratives that they sense might be important in the end, even if they do not yet have a full set of propositions that explain the material's relevance.<sup>5</sup>

Finally, historians are devoted to what economists would call small-N studies, that is, studies with few observations, on which one cannot reliably establish general propositions. Professor Scott's study has but two observations. Although some economists would be dismissive of a study that, as they view it, has only two data points, good economists appreciate small-N studies because they can suggest hypotheses that might be tested by examining a larger number of cases. Yet, economists have "priors" about which hypotheses are likely to be testable, and so will extract "economic-like" hypotheses from the historian's narrative more readily than they will extract other hypotheses. And when the economists do so, historians may see the economists as strikingly narrow.<sup>6</sup>

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4. I note that there are quite deep epistemological issues that I elide here. In particular, the position I sketch takes no position on whether there is a way of knowing things, usually described by the term *Verstehen* or as "apprehending" or "grasping" truth, independent of knowledge gained by the application of general laws—what I have been calling propositions—to facts. The differences I describe all arise within an epistemology that does not necessarily include *Verstehen* as a way of knowing.

5. An example is Professor Scott's discussion of the details of the Louisiana constitutional convention's disfranchisement of African Americans in 1898. Pp. 154–66. Throughout the discussion, Professor Scott alludes to the existence of, and difficulty of maintaining, cross-racial and cross-class political alliances. As I argue later in this Review, the connection between politics and markets is one of Professor Scott's central themes, and the existence of cross-racial and cross-class alliances is obviously important in politics generally. Yet, precisely how and why such alliances arose and were blocked remains more obscure in Professor Scott's account than do the hows and whys of other themes.

6. This is not a *conceptual* point about the differences between history and economics as academic subjects, but an empirical one, which I believe to be well founded.

## I. THE RIGHT TO PROPERTY AND CONTRACT

Slavery was, among other things, a system of organizing the use of labor in farming and other forms of production. But, referring to Cuban planters (though true in Louisiana as well) Professor Scott writes, “[T]hey did have to face the reality that in the long run some other form of organization of labor would need to be developed” (p. 95). What follows are some descriptions of arrangements that arose to replace slavery.

Some farmers in Cuba owned their own land and sold their sugar cane to larger plantations and refiners. In Professor Scott’s words, the contracts

provid[ed] for a share of the benefits to go to the individual grower but pegg[ed] remuneration to the price of sugar in order to minimize the financial risk for mill owners. The mill would make advances, supervise certain aspects of the growing, and receive the cane, settling the account once a season. (p. 117)

Although Professor Scott describes these contracts as “draconian,” one of the cane purchasers “complained that the ‘colonos [farmers] are giving us much more trouble than we anticipated . . . refus[ing] to sign new contracts unless we make them large advances, for more than their property is worth.’”<sup>7</sup>

An officer of the U.S. occupation forces in Cuba more than a decade later offered a rich description of labor arrangements:

“[T]he wages . . . are not sufficient to enable a man to support a family and save enough to buy the yoke of oxen, cart, plow, and pony, necessary to his independence.” He reported that “the laborers are not even allowed to cultivate gardens as they would then spend less of their wages at the Owner’s Store; on other estates they are given land and encouraged to an independence which however stops just short of selling them the land.” A laborer might occupy land rent free “in consideration of his being available for employment on an Ingenio [the estate’s refinery],” or farm on shares, or occasionally pay a small rent. (p. 181)

What system would work best for which industries was largely unknown because the use of slave labor had impeded development of parallel free labor systems. Consider sugar: Someone had to raise the sugar cane and transfer its ownership or possession to a refiner, who would produce the final product. Experience under slavery made it clear that refining could be done most effectively in large-scale factories. Beyond that, owners of capital, factory workers, and field workers would have to figure out what forms of labor organization were most efficient.

Plainly, factory workers would not bring anything other than their labor to the production process, but even there, should they be paid a fixed hourly, weekly, or seasonal wage, or should there be some sort of piece work

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7. P. 117. I wonder about the complaint’s accuracy: If the amount demanded for “advances” actually did exceed the property’s value, one would think that the cane purchaser would try to purchase the land directly. Presumably the complaint is overstated, and the cane purchaser did not want to buy the land and then work it himself or through wage workers.

system? Possibilities for raising sugar cane were even more varied. A cane field could be owned by the person who worked it, with the product sold to the refinery. The field could be leased from the refiner or a third party for a fixed rental. The sugar farmer could be a sharecropper, paying a variable rental fee and receiving a variable amount for the sugar he raised. And layered over all these possibilities were additional variations for buying the supplies needed to operate the sugar farm and the necessities of life. For example, a tenant could be allowed to raise pigs for home consumption, or could be prohibited from doing so. Professor Scott offers this description of what happened on one estate:

In June an old wall on the estate was taken down, leaving the "negros pig styes without protection so they will have to sell them or have them stolen it is imeterial [sic] to us which." Unsurprisingly, within a few weeks [the estate's manager] was reporting "a good deal of trouble with the negros who want me to pay them at the rate of \$3 1/2 per month for having taken from them the raising of pigs for sale." (p. 112)

On what basis would the labor arrangements be chosen? In part, of course, these arrangements would be determined by the industry's characteristics. Sugar refining could not go on without a labor arrangement that would bring large numbers of workers together under the supervision of a production manager. But, perhaps more important, the arrangements would be chosen on the basis of risk and with the possibility of opportunism.

Compare a contract to pay a worker a fixed wage with a sharecropping contract, in a world where natural disasters such as hurricanes can destroy a crop or where exogenous changes in demand can drive prices up or down substantially. The contract will determine who bears the consequences of the risk if it comes about. Similarly, different contracts provide different opportunities for opportunism, usually described as "shirking" when we talk about workers and "exploitation"—often of informational advantages—when we talk about employers. Describing one former slave in Cuba, Professor Scott writes, "In the year after she achieved formal freedom, her wage rose from 3 pesos a month to 8, but she did not work at all on the estate from June through December of 1886, in contrast to the year before" (p. 111). Here, it seems, the wage increase compensated for assumption of a greater risk of unemployment.

Professor Scott provides many examples of diverse contractual forms. William James leased a plantation in Louisiana for three years, and organized a work force of over eighty men and women who "partner[ed] with him in the hiring and working of it."<sup>8</sup> "Planters . . . were 'generally averse to leasing land to the freedmen,'" who were in turn unwilling to agree to annual wage contracts, and eventually arranged for wages paid at least monthly (p. 37). Elsewhere, an employer paid workers the wages they had

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8. P. 37. I would not place too much weight on the term *partner* in this quotation, but the author's distinction between "working" and "hiring" is suggestive.

accumulated over three months.<sup>9</sup> Facing resistance from former slaves who refused to work unless they could raise vegetables and other staples, one planter “‘ [g]ave the negroes their land’”—that is, allowed them to use portions of the property they leased from him for their domestic purposes (p. 38).

## II. ENFORCING PROPERTY AND CONTRACT RIGHTS: POLITICS

Eventually labor arrangements would stabilize, as workers and owners of land and physical capital came to understand their risk preferences and risks of opportunism, and as inefficient labor arrangements were competed away. In the early days after emancipation, though, nobody knew what arrangements would make sense for the long haul. This placed everyone at real risk. More than would be true in a stable economy, the parties might choose a contractual arrangement that seemed sensible but turned out to be quite bad, and one or the other side would want to get out of the duties it imposed. What then? Most of us today would think the answer obvious: the disgruntled party would go to court to enforce the agreement.<sup>10</sup> Professor Scott shows why going to court might not have been immediately available in Louisiana and Cuba.

Courts become available to enforce contracts only as a result of political action—which, in turn, sometimes depends on the labor arrangements in place. In this way markets and politics are mutually dependent. The classical definition of civil rights makes the point transparent. In the usage of the mid- and late-nineteenth century, the term referred to the right to own property and the right to enter into contracts, both located in the private economy, but also to the right to sue and, importantly, the right to testify in court.<sup>11</sup> The reason is clear: without the ability to present one’s case to the courts, the rights to contract and property would be empty ones, existing at the sufferance of the people with whom one contracted. Making a narrow point with much broader implications, Professor Scott points out, “[a]ny cross-racial movement that might need a modicum of legal protection . . . to survive . . . was left utterly vulnerable” (pp. 198–99).

Two examples of contracts I described earlier make clear the connection between contracts and the assumption that they will be enforced. According to Professor Scott, in the case of the payments of three months’ accumulated wages, withholding monthly wage payments “had been illegal” during the period just before the contracts were signed, when workers were in formal apprenticeships, and she intimates that withholding such payments from free workers would be a *fortiori* illegal (p. 116). The estate manager who had

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9. P. 116. Professor Scott says that “[m]onthly salaries had evidently been withheld,” although it might be that the contracts were for payment at three-month intervals.

10. Alternatively, we might rely on stable norms enforced by social sanctions. Such norms and sanctions were unavailable in the fluid and racially divided societies Professor Scott describes. (Thanks to Adrian Vermeule for this observation.)

11. For a discussion, see Mark Tushnet, *The Politics of Equality in Constitutional Law: The Equal Protection Clause, Dr. Du Bois, and Charles Hamilton Houston*, 74 J. AM. HIST. 884 (1987).

trouble with workers who wanted to raise pigs or get higher pay “put three of their ‘ringleaders’ in the stocks—a procedure outlawed some years before” (p. 112).

The managers in these instances were able to get away with these illegal or at least highly questionable practices because their workers did not have effective access to the courts. The entire thrust of Professor Scott’s narrative is showing how the emancipated populations in Louisiana and Cuba mobilized politically, in part precisely to ensure that they would be able to protect their rights as free workers. Because political action had broader implications as well, in only a few examples does Professor Scott’s treatment of politics focus expressly on access to the courts. She describes the willingness of the courts “[i]n the majority black, strongly Republican parish of Terrebonne” to enforce the priority created by workmen’s liens for workers’ claims against their employers’ property” (p. 48). The workmen’s lien, Professor Scott observes, gave workers a “powerful tool,” but using it “required that freedpeople get a fair hearing in the local courts, which in turn required maintaining the judicial standing and public respect that conservatives were bent on denying them” (p. 48).

Because the forms of labor arrangements that individuals made varied widely, and because choices were fluid in the state of economic and legal uncertainty that prevailed after emancipation, for free labor to flourish, the legal system had to enforce whatever contracts workers made, but did not have to assess the fairness of the contracts themselves. This rather modest aspect of freedom could be satisfied, Professor Scott shows, only if the freed workers had sufficient political power:

In the years after slavery various possibilities were open. . . . As long as the struggle had a strong electoral and labor dimension, as it did in Louisiana during Reconstruction, or involved a cross-racial movement for national independence, as it did in Cuba, it remained a true contest. White supremacy was a political project . . . [that] required legal backing right up to the top of the system. (pp. 258–59).

As I have suggested, today we simply assume that courts will be available to enforce contracts, and look to labor economists and students of industrial organization to analyze why particular labor arrangements make sense for specific industries and for people with particular risk preferences.<sup>12</sup> We relegate the task of analyzing the development of courts and other political institutions to political economists, and even those scholars tend to focus on the normal operation of legislatures and courts, examining the conditions under which courts function effectively only when their attention is directed to crisis or transitional settings—such as post-emancipation Louisiana and Cuba. But even then, they do not go back to examine the connection between the courts they analyze and labor arrangements, as Professor Scott does in her historian’s manner.

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12. My comments in this paragraph are based on the impressions I have had on reading what seem to me to be separate bodies of work by economists, who deal with contracting and labor arrangements, and by political economists, who deal with the creation and operation of courts.

Professor Scott recounts the stories, familiar to specialists in Louisianan and Cuban history, of suffrage struggles and their contrasting outcomes. In Louisiana, enfranchisement following emancipation was preserved as long as Republicans controlled the national government. After Reconstruction's end, disfranchisement became a primary goal of Louisiana's racial and social conservatives. They first accomplished a statutory disfranchisement, then embedded their success in Louisiana's 1898 constitution, which combined facially race-neutral restrictions on the franchise, such as literacy and property requirements, with a "grandfather clause," which allowed people who had the right to vote in 1867 (before Congress extended the right to vote to African-American men) and their heirs to "acquire a permanent right to vote, without meeting the literacy and property requirements otherwise introduced by the new constitution" (pp. 163–64). Reflecting the cross-racial military alliances that had prevailed against the Spanish colonial regime and carried through during the U.S. occupation, the Cuban Constitution of 1901–1902 created universal manhood suffrage, to the slight discomfort of the occupying forces (pp. 205–06).

The right to vote mattered not because voters could use it to obtain special interest legislation, but because without it they could not protect the civil rights they were nominally guaranteed. Suffrage "served as an important buffer against antidemocratic temptations and provided the framework within which a multitude of labor, mutual-aid, and educational associations . . . could proliferate" (pp. 258–60). The right to vote "carried with it . . . political leverage . . . [that] spread out into other realms of action, and particularly to the exercise of collective bargaining and of access to law" (p. 260). Again, I would stress how modest these claims really are: politics mattered because it allowed for the access to law that made meaningful the contracts free workers signed.

Legal protection for forms of labor flowed from political power, but forms of labor also affected the ability of workers to exercise political power. The clearest example Professor Scott provides comes from her treatment of gang wage labor.

The same labor segmentation that fenced black workers into specific jobs and not others created spaces in which solidarity could be constructed and enforced by the workers themselves: "Living in the planter-owned quarters, though otherwise a source of vulnerability, had an organizational advantage, for it made communication quick and group action feasible" (p. 83).

One need not agree with the connotations of the term *fenced into* to see how gang wage labor had *political* implications, as, of course, did the vulnerability of the workers to expulsion from their housing. Conservatives in Louisiana understood that labor segmentation had political consequences: "Potential alliances would be thwarted, and civic silence enforced selectively upon black workers" (p. 88). But, as Professor Scott immediately notes, "it was easier said than done" (p. 88). The reason, I think, is that markets, while dependent on politics for their basic operation, also have some freedom from politics. Workers' risk preferences and human capital



endowments are not determined by race, and sustaining a racially segmented market under conditions of free labor (where workers have access to the courts) is quite difficult.

Much of Professor Scott's narrative, particularly its treatment of Cuba, deals with the details of constructing cross-racial political alliances, and alliances between workers in the countryside and workers in urban areas.<sup>13</sup> As she writes, "[T]he links between structures and outcomes are rarely simple" (p. 153). The military struggle for national independence in Cuba created conditions for cross-racial political alliances that were absent in Louisiana, and, more important for present purposes, probably was a more significant factor in sustaining such alliances than the forms of labor on which I have focused were. Again, the historian's interest in granular detail is in tension with the social scientist's interest in generalization.

Early in her discussion, Professor Scott observes, "Each new initiative [by rural workers] . . . threatened elements of white supremacy on two fronts: the workplace and the public sphere" (pp. 82–83). This is a pretty good summary of the idea that markets (the workplace) and politics (the public sphere) are mutually dependent. That idea pervades, indeed it might be said to constitute the main theme of, *Degrees of Freedom*. At the same time, we should note that Professor Scott's rich descriptions of contracting processes, politics, and race resist reduction to the economist's propositions—to the explanatory sketches I have laid out in this Review—even as they generate such propositions.

#### CONCLUSION

I have examined Professor Scott's work with a quite narrowly focused lens. I have been, I think, reasonably self-conscious about my interest in extracting propositions from *Degrees of Freedom*, in the service of the contrast I have drawn between the historian's and the economist's sensibility. My summaries of contracts omit even the names of the parties and the plantations they worked on, for example, and Professor Scott's different practice reflects the historian's sensibility that details matter.

I should conclude, therefore, by emphasizing how elegantly she has constructed *Degrees of Freedom*. She gracefully brings the limitations of historical knowledge to our attention. For example, from the fact that census records reveal their residences and common last names, she infers that several individuals who resided near each other after emancipation were slaves on the same plantation, and notes that inferential step.<sup>14</sup> Her subtle references to what we do not and cannot know about the past remind us that

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13. See, e.g., p. 78 (describing the construction of alliances between activists in the countryside and in the towns).

14. See pp. 23–24 (naming the Albis/Sarría family as the owners of the Soledad plantation); p. 119 (identifying residents of a town with the surname Sarría as former slaves from the Soledad plantation).

there is much we do not—and probably cannot—know about the present or about the general propositions economists urge on us.

*Degrees of Freedom* is in part comparative history by juxtaposition, examining how similar issues—labor arrangements in the sugar industry, the distribution of the franchise in a racially divided society—were resolved in places that were similar yet different. But it is also comparative history by connection.<sup>15</sup> Professor Scott describes Cubans who spent time in Louisiana and Louisianans who spent time in Cuba.<sup>16</sup> The military commander who served for twenty-four hours as the military governor of New Orleans in 1874 becomes the first U.S. military governor of Cuba in 1899 (p. 155). Professor Scott builds on these personal connections to enhance our appreciation of the thematic resonances between the Louisianan and Cuban portions of her narrative.<sup>17</sup>

The very elegance of Professor Scott's presentation shows how historians can contribute to our understanding of economic practices. A diagram or chart might help some of us, but the photographs and details Professor Scott provides will help others.

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15. *E.g.*, p. 4 (“[T]he stories become intertwined rather than juxtaposed . . .”).

16. *See, e.g.*, pp. 2–4.

17. I use the singular here deliberately.

